

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

M.T.G., INC., d/b/a MATRIX
TECHNOLOGIES GROUP,

Case No. 95-48268
Chapter 7

Debtor.

Judge Thomas J. Tucker

**ORDER SUSTAINING IN PART AND OVERRULING IN PART
OBJECTIONS OF COMERICA BANK AND CHARLES J. TAUNT
TO THE AFFIDAVIT OF JOHN D. HERTZBERG**

The following motions/matters, among others, were heard by the Court on March 17,
2005:

1. The Successor Trustee's and Todd M. Halbert's Motion for Summary Judgment on Fraud on the Court Claim (Docket #1153);
2. Charles J. Taunt's Motion for Summary Judgment (Docket #1159);
3. Corrected Miller Canfield's Cross-Motion for Summary Judgment of the Halbert/Vining "Fraud on the Court" Claims Against Miller Canfield (Docket #1178); and
4. Comerica Bank's Motion to Strike Brief and Cross-Motion to Dismiss and for Summary Judgment (Docket #1160).

Shortly before the hearing on these cross-motions for summary judgment, Todd M. Halbert filed the Affidavit of John D. Hertzberg, on March 11, 2005 (Docket #1332). At the March 17 hearing, and in written objections, Comerica Bank and Charles J. Taunt objected to the Court's consideration of the Hertzberg Affidavit in ruling on the summary judgment motions. Comerica Bank filed written objections on March 17, 2005 (Docket #1334) and Taunt filed objections on March 23, 2005 (Docket #1336). Halbert did not file any written response to these objections.

The Court has considered the objections, and Halbert's response to them made during the March 17, 2005 hearing, and now will sustain the objections in part and overrule them in part, as described below.

Comerica Bank and Taunt each argue that the Hertzberg Affidavit should be disregarded in its entirety in the Court's consideration of the summary judgment motions, because it was not timely filed. They correctly point out that the Hertzberg Affidavit was filed by Halbert long after the June 10, 2004 deadline set by the Court for Vining, Trustee and Halbert to file the last of their papers regarding the summary judgment motions. *See* Order, filed June 3, 2004 (Docket #1220).

Halbert responded to this argument during the March 17 hearing, not by denying that he filed the Hertzberg Affidavit long after the Court's deadline for his summary judgment-related papers, but rather only by arguing that he had a right, under Fed. R. Civ. P. 56(c) (made applicable by Fed. R. Bankr. P. 9014(c) and 7056), to file the Hertzberg Affidavit anytime "prior to the day of hearing" on the motions. As Taunt pointed out in his written objections, however, Rule 56(c) permits service only of "opposing affidavits" at any time "prior to the day of hearing." The rule does not give a summary judgment movant the right to file affidavits in support of his summary judgment motion at any time other than "with" the motion for summary judgment. *See* Civil Rule 56(a) and (b). It does not permit a summary judgment movant to file affidavits in support of his motion up until just prior to the day of hearing on the motion. Rather, under Rule 56(c) only affidavits "opposing" a summary judgment motion may be filed that late.

Consistent with Civil Rule 56(c), Fed.R.Bankr.P. 9006(d) also requires affidavits in support of a motion to be filed with the motion. It provides, in relevant part: "When a motion is supported by affidavit, the affidavit shall be served with the motion[.]" The rule then says that

“opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.” Cases interpreting Fed.R.Civ.P. 6(d), which contains identical language to that in Fed.R.Bankr.P. 9006(d) quoted above, hold that affidavits in support of a summary motion must be filed with the motion. *See, e.g., Canning v. Star Publishing Co.*, 19 F.R.D. 281, 283-284 (D. Del. 1956); *Stonewall Ins. Co. v. Boykin*, 562 So.2d 1310, 1312 (Ala. Civ. App. 1989).

The Court has some discretion on whether to consider an untimely filed affidavit. *See Hooks v. Hooks*, 771 F.2d 935, 946 (6th Cir. 1985)(“[I]t is within the discretion of the district courts whether to consider affidavits submitted in an untimely fashion[.]”); *Allard v. Vinci (In re DeLorean Motor Company)*, 91 B.R. 766, 768 (Bankr. E.D. Mich. 1988)(“It is within the court’s discretion whether to consider affidavits and documents submitted beyond a stated deadline.”)(relying on *Hood*, 771 F.2d at 946); *see also* Fed.R.Civ.P.56(e) (“The court may permit affidavits to be supplemented . . . by . . . further affidavits”); Fed.R.Bankr.P 9006(b)(1) (permitting the Court to enlarge the time “when an act is required or allowed to be done at or within a specified period by [the Federal Rules of Bankruptcy Procedure]” under certain specified circumstances). However, the Court declines to exercise its discretion in favor of considering the Hertzberg Affidavit for the purpose of supporting Vining’s, Trustee’s and Halbert’s motions for summary judgment because (1) it was filed long after the June 10, 2004 deadline for the filing of papers regarding the summary judgment motions; (2) Halbert made no attempt to comply with Fed.R.Bankr.P. 9006(b)(1) by requesting, before June 10, 2004, an extension of time to file the Hertzberg affidavit; and (3) Halbert has not offered any reasonable explanation or justification for the untimely filing.

For these reasons, this first objection by Comerica Bank and Taunt to the Hertzberg Affidavit is sustained in part and overruled in part. To the extent the Hertzberg Affidavit is offered by Halbert in opposition to the summary judgment motions of Taunt, Miller Canfield, and Comerica Bank, the Court will deem it timely, and it may be considered for that purpose under Civil Rule 56(c), subject to further restrictions discussed below, since it was filed prior to the day of the summary judgment hearing. To the extent the Hertzberg Affidavit is offered by Halbert in support of the motion of Vining, Trustee and Halbert for summary judgment, the timeliness objections are sustained and it will not be considered for that purpose.

Comerica Bank made a second objection to the Hertzberg Affidavit, namely that it contains matters protected by Comerica Bank's attorney-client privilege. (The Affidavit indicates that Mr. Hertzberg represented Comerica Bank at the relevant times.) The Court finds this objection to be well taken, with respect to the following provisions of the Hertzberg Affidavit. Such provisions will be disregarded entirely by the Court in ruling on the pending motions for summary judgment:

1. The fourth sentence of ¶ 15.
2. The second sentence of ¶ 18.
3. All of ¶ 21.
4. All of ¶ 22.
5. All of ¶ 37.

The remaining portions of the Hertzberg Affidavit are not protected by the attorney-client privilege; much of the remainder of the Affidavit reveals information and communications that were conveyed to or in the presence of parties other than Comerica Bank or its personnel or its attorneys.

At the March 17 hearing, Halbert argued that the so-called "crime-fraud exception" to the attorney-client privilege applies. Halbert did not, however, explain how any of the particular

portions of the Affidavit that the Court has listed above are subject to that exception, and has failed to demonstrate that the exception applies with respect to any of the matters the Court now rules is protected by the privilege. *See generally* Rule 1.6(c)(3) and (4), Michigan Rules of Professional Conduct.

For these reasons,

IT IS ORDERED that the objections of Comerica Bank and Charles J. Taunt to the Affidavit of John D. Hertzberg, which objections were filed on March 17, 2005 (Docket #1334) and on March 23, 2005 (Docket #1336) are sustained in part and overruled in part. In ruling on the pending motions for summary judgment, which are now under advisement, (1) the Court will consider the Affidavit of John D. Hertzberg and its exhibits solely in ruling on the summary judgment motions filed by Taunt, Miller Canfield, and Comerica Bank, and not in ruling on the summary judgment motion filed by Vining, Trustee and Halbert; and (2) the Court will not consider for any purpose any of the portions of the Hertzberg Affidavit identified in this Order as being protected by the attorney-client privilege.

IT IS SO ORDERED.

Date: October 14, 2005

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge

cc: Todd M. Halbert
Guy C. Vining, Trustee
Robert J. Diehl, Jr.
Michael J. Reynolds
Mark E. Shreve
Claretta Evans
Brian D. Einhorn
Jeffrey M. Frank